IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

WEDNESDAY, THE 31ST JANUARY 2007 / 11TH MAGHA 1928

OP.No. 28065 of 1999(N)

PETITIONER:

M/S. J.V.J. LIQUORS, PERUMBAVOOR, REP. BY ITS MANAGING PARTNER P.G. VIJAYAN.

BY ADV. SRI.V.P.SUKUMAR
SRI.BOBBY JOHN

RESPONDENTS:

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1. THE SALES TAX OFFICER, II CIRCLE, PERUMBAVOOR.

2 THE DEPUTY TAHSILDAR (R.R), TALUK OFFICE, THODUPUZHA.

BY GOVERNMENT PLEADER SRI. C.K. GOVINDAN

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD 16/1/2007, THE COURT ON 31/01/2007, DELIVERED THE FOLLOWING:

PETITIONER'S EXHIBITS:

EXT.P1 TRUE COPY OF THE ORDER DT. 2-4-1993.

EXT.P2 ASSESSMENT ORDER DT.13-3-1998.

EXT.P3 R.R.NOTICEDT.14-10-1999.

EXT.P3(a) ENGLISH TRANSLATION OF EXT. P3.

[TRUE COPY]

P.S TO JUDGE.

S. Siri Jagan, J.

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O.P. No. 28065 of 1999

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Dated this, the January, 2007.

J U D G M E N T

In this original petition a question of law has been raised by an assessee under the Kerala General Sales Tax Act (for short 'KGST Act'), as to whether for delay in payment of surcharge under the Kerala Surcharge on Taxes Act, 1957 (Surcharge Act), interest can be levied under Section 23(3) of the KGST Act in the absence of a specific provision in the Surcharge Act for levy of interest?

2. The facts necessary for disposal of this original petition are as follows. The petitioner was a firm engaged in the business of retail sales of arrack during the year 1992-'93. The petitioner opted to pay tax under Section 7(14) of the KGST Act to remit tax on compounded rates as per Ext. P1 order. Pursuant to Ext. P1 order, the petitioner paid tax in monthly instalments after deducting the tax paid on purchase of arrack at the first sale point. Although at that point, surcharge under the Surcharge Act was also leviable on the tax so paid, the same was not paid as original petitions were pending before this Court challenging the levy of surcharge under the Surcharge Act on tax payable under Section 7(14) of the KGST Act and this Court had granted interim stay in those petitions, which were later decided against the assessees. Subsequently, assessment orders were passed in respect of the petitioner for the assessment year 1992-'93 in which surcharge of Rs. 3255-20 was also demanded. The said assessment order is produced as Ext. P2. Thereafter, the petitioner was served with Ext. P3 revenue recovery notice demanding amounts of Rs. 22,661/- and Rs. 6,118/-. According to the petitioner, the amount of Rs. 22,661/- represents surcharge and the amount of Rs. 6,118/- represents penal interest on the surcharge. The petitioner is challenging Ext.P3 notice to the extent it demands interest on the surcharge for delayed payment of surcharge and seeks the following

reliefs:

> "i. To issue a writ in the nature of certiorari or any other appropriate writ or order quashing Exhibit-P3 notice issued by the 2nd respondent' or
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> ii. to issue a writ in the nature of mandamus or any other appropriate writ or order, directing the 2nd respondent to accept Rs. 22,661.00 in full settlement of the amount covered by Exhibit-P3 notice;
>
> iii. To declare that no interest is leviable on the arrears of surcharge due under the Kerala Surcharge on Taxes Act, 1957."

3. The contention of the petitioner is that payment of interest is a substantive provision and unless the liability to pay the same is provided for by the Act by which surcharge is levied itself, interest cannot be charged on the surcharge. The petitioner would point out that under the Surcharge Act, there is no provision whatsoever under which an assessee is liable to pay interest on surcharge and therefore no surcharge can be levied on the surcharge as demanded by Ext. P3.

4. The defence of the Revenue is that as is evident from Section 3(b) of the Surcharge Act, the provisions of the KGST Act shall apply in relation to surcharge also as they apply in relation to the tax payable under the said Act and therefore since Section 23(3) of the KGST Act provides for levy of interest for delayed payment of tax under the KGST Act, automatically interest would be leviable for delay in payment of surcharge as well under Section 23(3) of the KGST Act.

5. The above argument is countered by the counsel for the petitioner relying upon the decision of the Supreme Court in India Carbon Ltd. v. State of Assam, reported in 106 (1997) STC 460. He would submit that in that decision, although Section 9(2) of the Central Sales-tax Act provided that the authorities under the general sales tax law of the State shall, on behalf of the Government of India, assess and collect tax under the Central Sales-tax Act as if the same is a tax or penalty payable under the general sales tax law of the State including the provision for payment of interest, the Supreme Court

held that in so far as the Central Sales-tax Act did not contain a provision to pay interest on central sales tax, no interest can be levied on the central sales tax by invoking the provisions in the General Sales Tax Act of the State by resort to Section 9(2) of the Central Sales Tax Act.

6. I have considered the rival contentions in detail.

7. For the purpose of deciding the issue involved, first the nature of the surcharge has to be looked into. The preamble to the Surcharge Act reads as under:

> "**Preamble**:- Whereas it is considered necessary to increase the taxes on agricultural income, taxes on the sale or purchase of goods and taxed on profession, by the levy of a surcharge on such taxes."

Section 3 of the Surcharge Act, which is the charging Section in respect of surcharge on sales tax, reads as under:

> "**3. Levy of surcharge on sales and purchase taxes:-** (1) The tax payable under the Kerala General Sales Tax Act, 1963 shall, in the case of a dealer whose turnover-
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> (a) is not less than one lakh rupees but does not exceed ten lakhs rupees in a year, be increased by a surcharge at the rate of five per centum, and
>
> (b) exceeds ten lakhs rupees in a year, be increased by a surcharge at the rate of ten per centum, of the tax payable for that year,
>
> and the provisions of the Kerala General Sales Tax Act, 1963 shall apply in relation to the said surcharge as they apply in relation to the tax payable under the said Act.
>
> Provided that where in respect of declared goods as defined in clause (c) of Section 2 of the Central Sales tax act, 1956, the tax payable by such dealer under the Kerala General Sales Tax Act, 1963 together with the surcharge payable under this sub-section exceeds four per centum of the sale or purchase price, the rate of surcharge in respect of such goods shall be reduced to such an extent that the tax and the surcharge together shall not exceed four per centum of the sale or purchase price.
>
> (2) Notwithstanding anything contained in sub-section (1) of Section 22 of the Kerala General Sales Tax Act, 1963 no

> dealer referred to in sub-section (1) shall be entitled to collect the surcharge payable under the said sub-section.
>
> (3) any dealer who collects the surcharge payable under sub-section (1) in contravention of the provisions of sub-section (2) shall be punishable wit fine which may extend to one thousand rupees and no court below the rank of a Magistrate of the First Class shall try any such offence."

(Emphasis supplied)

Going by the preamble and the charging Section, it is abundantly clear that the surcharge is not a separate tax at all unrelated to sales tax under the KGST Act but only sales tax itself under the KGST Act, just like additional sales tax leviable under the KGST Act. In this connection, it is to be noted that the Surcharge Act was enacted not only in respect of the KGST Act but also in respect of Agricultural Income Tax Act and tax on profession. Therefore, evidently, the intention of the legislature was to pass a common legislation in respect of three separate legislations for collecting additional tax by imposing surcharge on those taxes. That would indicate that the intention was not to bring in a new tax by name 'surcharge' but only to increase the sales tax by the amount of surcharge fixed under the Surcharge Act. Further, in clause (b) of Section 3(1), the entire provisions of the KGST Act has been made applicable to the said surcharge as they apply in relation to tax payable under the KGST Act. This also would be a pointer to the fact that what has been levied under the Surcharge Act is an increased sales tax as payable under the KGST Act.

8. The decision of India Carbon's case relied upon by the learned counsel for the petitioner is clearly distinguishable on facts. Central Sales tax is a different kind of tax from tax under the KGST Act. The Central Sales Tax Act levies sales tax only on inter-State sales, whereas the KGST Act levies sales tax only on local sales. Both taxes are different in nature and content although both are sales tax.

Central Sales Tax Act is not an addition to the KGST Act, but a separate tax, collection of which has been made the responsibility of the officers under the KGST Act by resort to the procedure prescribed under that Act. Further Section 9(2) of the Act does not make the entire provisions of the KGST Act applicable to Central Sales Tax Act. Section 9(2) reads as under:

> "9(2) Subject to the other provisions of this Act and the rules made thereunder, the authorities for the time being empowered to assess, reassess, collect and enforce payment of any tax under the general sales tax law of the appropriate State shall, on behalf of the Government of India, assess, reassess, collect and enforce payment of tax, including any penalty, payable by a dealer under this Act as if the tax or penalty payable by such a dealer under this Act is a tax or penalty payable under the general sales tax law of the State; and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds, rebates, penalties, charging or payment of interest, compounding of offence and treatment of documents furnished by a dealer as a confidential, shall apply accordingly."

The basic reasoning in India Carbon's case has been borrowed from an earlier decision of a Constitution Bench of the Supreme Court in J.K. Synthetics Ltd. v. Commercial Taxes Officer, [1994] 94 STC 422 (Supreme Court). The relevant portion of that decision has been extracted in India Carbon's case as follows:

> "16. It is well-known that when a statute levies a tax it does so by inserting charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed

> but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. (See Whitney v. Commissioners of Inland Revenue [1926] AC 37, Commissioner of Income-tax v. Mahaliram Ramjidas [1940] 8 ITR 442 (PC), India United Mills Ltd. v. Commissioner of Excess Profits Tax [1955] 27 ITR 20 (SC); [1955] 1 SCR 810 and Gursahai Saigal v. Commissioner of Income-tax [1963]48 ITR 1 (SC); [1963] 3 SCR 893). But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. (See Bengal Nagpur Railway Co. Ltd. v. Ruttanji Ramji, AIR 1938 PC 67 and Union of India v. A.L. Rallia Ram [1964] 3 SCR 164 at 185 to 190). Our attention was, however, drawn by Mr. Sen to two cases. Even in those cases, Commissioner of Income-tax v. M. Chandra Sekhar [1985] 151 ITR 433 (SC) and Central Provinces Manganese Ore Co. Ltd. v. Commissioner of Income-tax [1986] 160 ITR 961 (SC), all that the court pointed out was that provision for charging interest was, it seems, introduced in order to compensate for the loss occasioned to the Revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for the delay in payment of tax. But regardless of the reason which impelled the Legislature to provide for charging interest, the court must give that meaning to it as it conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal rule of interpretation of statutes, we find, as pointed out by under Section earlier and by Bhagwati, J., in the Associated Cement Company's case [1981] 48 STC 446 (SC) that if the Revenu's contention is accepted it leads to conflicts and creates certain anomalies which could never have been intended by the Legislature."
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> (Emphasis supplied)

Going by the above reasoning, the question as to what we have to look into is whether, while enacting the Surcharge Act, the Legislature wanted to apply the provisions of KGST Act as a substantive law or an adjectival law.

9. As I have already mentioned above, the preamble and the

charging section give a clear indication of the intention of the Legislature. The intention of the Legislature is evidently to increase the tax on sale or purchase of goods by the per centum mentioned under Section 3. In fact, in sub-clause (1) of sub-section (1) of Section 3 also what is mentioned is that the tax payable under the KGST Act shall be increased by a surcharge at the rate of 5% in respect of a dealer whose turnover is not less than 1 lakh rupees but does not exceed 10 lakhs rupees in an year and at the rate of 10% if the turnover exceeds 10 lakhs rupees. Going by the above said provisions, I have no doubt in my mind that surcharge is nothing but sales tax under the Kerala General Sales Tax itself and does not have a separate existence apart from the General Sales Tax Act unlike in the case of central sales tax under the Central Sales Tax act, which was the subject matter of the decision in India Carbon's case. Therefore, India Carbon's case is clearly inapplicable to the facts of this case going by the language of the Surcharge Act and the purpose behind enacting the Surcharge Act.

10. Both sides have relied on some other decisions also like Maruti Wire Industries Pvt. Ltd. v. Sales Tax Officer, First Circle, Mattancherry and others, [2001] 122 STC 410, Aleyamma v. Sales-tax Officer, 1993 (1) KLT 810, Fashion Jewellers & Exporters v. Sales-tax Officer, 2005 (3) KLT 353 and the judgments in O.P.Nos. 1860/1998 17412/2000. None of those decisions throw any light on the issue involved in this original petition since they do not relate to charging of interest on delayed payment of a tax levied under one Act by resort to provision for interest in another Act.

The result of the above discussion is that surcharge being nothing but sales tax itself, there is no jurisdictional defect in the respondents demanding interest on the surcharge by resort to Section 23(3) of the Kerala General Sales Tax Act which obviously was the intention of the legislature while enacting the Kerala Surcharge

on Taxes Act, 1957. In that view, I do not find any merit in the original petition and, accordingly, the same is dismissed.

Sd/- S. Siri Jagan, Judge.

Tds/

S. Siri Jagan, J.

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O.P. No. 28065 of 1999

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J U D G M E N T

January, 2007.